Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of SBC Communications Inc. Emergency Petition for Declaratory Ruling, Preemption, and For Standstill Order To Preserve the Viability of Commercial Negotiations	)))))))))	WC Docket No. 04-172

SBC'S REPLY TO OPPOSITIONS

In the wake of the *USTA II* decision, the Commissioners unanimously declared that consumer welfare would best be served by good-faith negotiations between ILECs and CLECs for the provision of commercial substitutes for unbundled network elements, and, in particular, a commercial substitute for UNE-P. In accordance with this objective, SBC and Sage used "all means at their disposal" to "maximize" the success of their wholesale negotiations,[1] which resulted in the first private commercial agreement for a UNE-P replacement. That agreement marks a watershed departure from the internecine regulatory disputes brought on by UNE-P over the prior eight years.

The parties opposing SBC's *Emergency Petition* apparently fail to see the public policy benefits of commercial negotiations.[2] Rather than hail the agreement as a welcome advance in wholesale relations and consumer welfare, they revile the agreement precisely because of its commercial nature. Without addressing the merits of the specific issues and arguments raised in

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[1] Letter from Chairman Michael K. Powell, *et al.*, Federal Communications Commission, to Edward Whitacre, SBC Communications, at 1 (Mar. 31, 2004) ("March 31 Letter").

[2] Indeed, the fact that the SAFE-T coalition of CLECs feels the need to ask the question that, if commercial agreements are not section 252 agreements, "Well, then what are they?" serves to highlight the inability of some CLECs to even contemplate the possibility of operating outside the confines of the regulatory world. *SAFE-T Opposition* at 3.

SBC's *Emergency Petition*, they argue that all agreements governing the ongoing wholesale relationship between ILECs and CLECs must be filed for state review and approval under section 252 of the Act—regardless of the substantive scope of such agreements.[3] The Commission should reject this proposition as flatly inconsistent with its unanimous call for commercial negotiations, and with its *Qwest ICA Order*.[4] Indeed, it repudiates the very concept of commercial negotiations.

Negotiations that are subject to the strictures of regulatory oversight and control are not the same as private voluntary commercial negotiations. Rather, as has been the pattern over the last eight years, they are negotiations—usually preceded and followed by litigation—over the precise contours of the regulatory obligations between the parties. And, as discussed in detail in SBC's *Emergency Petition*, the very prospect of subjecting agreements to state commissions for their review—and possible modification or even rejection—will frustrate efforts to reach commercial agreements. The notion that all agreements between ILECs and CLECs must be filed with state commissions for review and approval would thus represent a giant step backward in the accomplishment of the Commissioners' objectives.

In addition, as a legal matter, the actual language of section 252 simply does not support the assertion that all ILEC-CLEC wholesale agreements must be filed with state commissions. To the contrary, section 252 specifically limits the types of agreements which must be submitted

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[3] *See SAFE-T Opposition* at 2 (". . . SBC must file all of its 'commercial agreements' for interconnection services to CLECs"); *Michigan PSC Opposition* at 6 ("Clearly, the 'private commercially negotiated agreement' between SBC and Sage governs interconnection between those two entities, and is required to be filed with the Michigan Commission pursuant to Section 252(a)(1) of the FTA."); Letter from Lance Honea, CEO, AccessOne, Inc., *et. al*., to The Honorable Michael K. Powell, Chairman, Federal Communications Commission, *et. al.* at 2 (May 10, 2004)("Access One Letter")("Therefore, Section 252 clearly establishes that any agreement that addresses interconnection, network elements, or services, as those terms are explicitly or implicitly defined in the Act is an agreement that, consistent with Section 252(i), must be filed with state commissions.").

[4] Memorandum Opinion and Order, *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, 17 FCC Rcd 19337, FCC 02-276 (2002)("Qwest ICA Order").

to state commissions, and that limiting language must be given some effect. Section 252(a)(1) states that "upon receiving a request for interconnection, services or network elements pursuant to section 251," an ILEC "may negotiate and enter into a binding agreement with the requesting telecommunications carrier without regard to the standards set forth in subsections (b) and (c) of section 251."[5] It then provides that any such agreement "shall be submitted to the State commission."[6] Thus, the only agreement that must be filed with a state commission is one that is triggered by "a CLEC request for interconnection, services or network elements pursuant to section 251."[7] In arguing that all ILEC-CLEC wholesale agreements are subject to section 252, the parties opposing SBC's *Emergency Petition* effectively render the limiting language in section 252 meaningless. The only conclusion that provides substance to the language of section 252—and that is also consistent with the language of section 251 and the Commission's conclusion in the *Qwest ICA Order* that not all ILEC-CLEC agreements need to be filed with state commissions[8]—is that section 252 requires the filing only of those rates, terms, and conditions under which the parties address their section 251(b) and (c) obligations.

Moreover, a conclusion that section 252 has no substantive limits as to the agreements over which state commissions have jurisdiction would lead to absurd results. It would mean that state commissions have jurisdiction over interstate services—such as interstate access—so long as the terms for the provision of those services are set forth in an agreement between an ILEC and a requesting telecommunications carrier. It thus would produce a tail wagging the dog approach to state jurisdiction, in which the mere presence of an agreement, rather than the nature of the goods and services that are the subject of that agreement, confers jurisdiction. Only by

[5] 47 U.S.C. § 252(a)(1).

[6] *Id.*

[7] *Id.*

[8] *Qwest ICA Order* ¶ 8 n.26.

applying some limiting standard—based on the substantive requirements of section 251—to section 252's requirements, can such absurd results be avoided.[9]

To provide some rational limitations on the requirements of section 252 and to eliminate the current impediment to commercial negotiations currently erected by various states,[10] the Commission should grant SBC's *Emergency Petition* and declare that section 252's requirements, including the filing of agreements for state review and approval and the MFN requirements of section 252(i), do not apply to non-251 arrangements. In addition, to ensure that the commercial negotiation process has a chance to succeed, the Commission should preempt any contrary or conflicting state requirement. Given that the Michigan PSC and other state commissions have specifically invoked state law as requiring the filing of non-251 agreements, *see, e.g., Michigan PSC Opposition* at 2-4, preemption is necessary and appropriate.

Such action would comport, not only with the plain language of section 252 itself, but also with the overall purposes of the Act. Sections 251(b) and (c) impose requirements that Congress deemed essential to the development of local competition. It would make sense, therefore, that Congress would insist that the terms under which carriers endeavor to meet these requirements be reviewed by state commissions. Conversely, there is no reason why Congress

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[9] Nor can the Commission's language that states "should determine in the first instance which sorts of agreements fall within the scope of the statutory standard," *Qwest ICA Order* ¶ 11, mean that ILECs must file all contracts with the states in order for the states to determine which contracts must be filed, as some CLECs suggest. *See AccessOne Letter* at 2. Such an interpretation would effectively nullify the Commission's determination that ILECs need not file all agreements. Moreover, the "statutory standard" the Commission was referring to was section 251(a)(1), and the Commission specifically determined that "this standard recognizes the statutory balance between the rights of competitive LECs to obtain interconnection terms pursuant to section 252(i) and *removing unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs*." *Qwest ICA Order* ¶ 8 (Emphasis added). It also can not be the case that the Commission intended to provide the states greater authority than they have under the Act to review only those agreements resulting from a request pursuant to section 251. The Commission does not have the authority to empower the states to act beyond the scope of the authority conferred upon them by the Act.

[10] Since SBC filed its *Emergency Petition*, more state commissions have gotten involved in this issue. It is thus even more imperative that the Commission affirmatively declare that this conclusion is controlling as a matter of federal law and is binding on state commissions.

would subject arrangements for other services and facilities to the same scrutiny. Since Congress did not deem such arrangements important enough to require in the first place, it would be odd to construe the Act as requiring state approval of the terms on which a carrier purports to provide such arrangements. Finally, the Commission should address SBC's petition on an emergency basis and should immediately issue a stand-still order enjoining the enforcement of any filing requirement while the petition is pending.[11]

Respectfully Submitted,

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[11] The Michigan PSC argues that the Commission does not have authority to issue a standstill order enjoining the states from requiring the filing of non-251 agreements. *Michigan PSC Opposition* at 7-8. That is plainly wrong. The Commission clearly has authority to issue, and has issued, standstill orders on other issues. *See Ameritech Teaming Agreement Standstill Order*; *AT&T Corp., et. al., v. Ameritech Corp.*, 1998 WL 325242 (N.D. Ill., June 10, 1998).